No. 20,873

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED FRUIT COMPANY,
Appellant,

vs.

MARINE TERMINALS CORPORATION,
Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION

Appellee incorporates in full Appellant's statement on jurisdiction.

STATEMENT OF THE CASE

Appellee has no quarrel with the first and third paragraphs (p. 2) of Appellant's "Statement of the Case". However, in particular, Appellee challenges Appellant's statement that most of the critical facts are not disputed, and that the findings are not sufficiently detailed for a comprehensive understanding of the accident. Appellant relies upon many claimed facts which were in dispute at the trial:

(a) That after inspection of the access trunkway the day before the accident "no one from the

vessel thereafter went into the access trunkway". This statement is contrary to the testimony of the stevedore company's walking boss, Mr. Heffernan (R. 4, pp. 30-31); the gang boss, Joseph Teixeira (R. 2, pp. 39, 46, 47).

(b) That the longshoremen took the small bin boards and "sometimes placed them in the storage rack" of the access trunkway. This was completely refuted by the longshore personnel whose testimony was heard and weighed by the trial court: Gang Boss Teixeira (R. 2, pp. 52-53, 55-57, 60-61); and Walking Boss Hefferman (R. 4, pp. 9-10, 21, 25, 26).

(c) That "the particular bin board was in place in its side slots when the ship came into San Francisco." There was no such evidence offered at the trial—aside from general custom and practice.

(d) That Appellee "was not only in control in fact, but also in control, as a matter of law" under the written contract. Walking Boss Hefferman testified, as did Gang Boss Teixeira, that the escape hatch (access trunkway) was not a part of the working area (R. 2, pp. 60-61; R. 4, p. 14), and that ship personnel were continuously in and out of this area during the stevedoring operations (R. 2, pp. 26, 39, 46, 47, 61; R. 4, pp. 14, 30, 31).

Finally, in its "Statement of the Case", Appellant asserts that the Court erred in finding that Appellant had failed to prove that a longshoreman had misplaced

the bin board in a precarious position. Appellee considers this argumentative statement to be completely without basis, as will hereafter be shown.

SUMMARY OF ARGUMENT

In Appellant's "Summary of Argument", it is claimed that by reason of the written contract existing between the shipowner and the stevedore, the responsibility for the accident was thrust upon the stevedore company. It is argued that the contract provided that the stevedore was to be "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operation", and therefore, the mere happening of an accident in the area of work operations placed exclusive responsibility upon the stevedore. The District Court's finding that Appellant failed to meet its burden of proof is claimed to be erroneous. This is based on the tenuous argument that the evidence "indicates" that only longshoremen handled the bin boards while the vessel was in San Francisco.

As hereinbefore stated, Walking Boss Heffernan and Gang Boss Teixeira testified that longshoremen never placed bin boards in the rack from which the offending board fell. On cross-examination by Appellant's counsel, Mr. Heffernan made it quite clear that longshoremen never used this rack for storage of the short bin boards (R. 5, pp. 21, 25, 26). The District Court accepted the reliability of this testimony.

Indeed, the only logical finding the trial court could make in the light of the evidence presented, was that liability against the stevedore company had not been established by Appellant.

ARGUMENT

I

THE PROVISIONS OF THE CONTRACT AS APPLIED TO THE EVIDENCE DO NOT IMPOSE LIABILITY ON THE STEVEDORE.

The District Court gave full consideration to the provisions of the contract, and on the basis of all the evidence, found against the shipowner and in favor of the stevedore. Appellant indulges in theorizing on the intended responsibilities under the contract, which was drawn up by the shipowner. It is axiomatic that any ambiguity must be resolved against the maker of the contract.

Appellant contends that under the contract, the stevedore company is deemed to be "in full control" of the working area. There was testimony in the case that the access hatchway from which the bin board fell was not considered by the longshoremen to be a part of the working area, and furthermore, that this access trunkway was continuously used by ship personnel, as well as by the longshoremen (R. 2, pp. 26, 39, 46, 47, 60, 61; R. 4, pp. 14, 30, 31).

In view of the foregoing, and in the face of positive evidence that longshoremen never placed bin boards in the rack in question, and a complete lack of any

acceptable testimony to the contrary, it is difficult to comprehend Appellant's statement that the trial court "failed completely to give effect to the contract provision for control and did so without so much as suggesting a reason for its invalidity". This would appear to be more in the nature of an unfounded assertion, rather than valid argument against the trial court's finding that the shipowner failed to meet the burden of proof.

II

THE TRIAL COURT'S FINDING THAT THE SHIPOWNER FAILED TO PROVE THAT A LONGSHOREMAN MISPLACED THE BIN BOARD IN ITS PRECARIOUS POSITION IS AMPLY SUPPORTED BY THE RECORD AND IS THEREFORE NOT CLEARLY ERRONEOUS.

Federal Rules of Civil Procedure Rule 52 provides, in part, as follows:

> "Rule 52. Findings By The Court.
>
> (a) *Effect*
>
> ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

Appellant endeavored to prove, through custom and practice that ship's personnel did not use the access trunkway from the time the stevedoring operations commenced up to the happening of the accident, some three hours later. It is argued that the bin boards in the access trunkway "had to be in their proper places" when the ship came into San Francisco, because the

No. 1 hold was fully loaded; and that it would have been impossible for the bin board to have been in a precarious position in the bin-board rack while the vessel was pitching and yawing and rolling on its trip to San Francisco "because it would have fallen down." If one is to indulge in speculation, one might also suggest that the pitching and yawing caused the offending bin board to become partially dislodged.

It was established through testimony of Gang Boss Teixeira that only two bin boards would have to be in place in the access trunkway to keep the bananas from falling—although there are five or six bin boards provided for that purpose (R. 2, p. 42). Just how many were in place and how many were in the rack of the access trunkway was never shown by any direct evidence.

All of the stevedore employees testified that the longshoremen never place the small bin boards in the rack in the access trunkway and were never told to use this rack. They always stored the bin boards in the wings, away from from the access trunkway.

With reference to Appellant's statement (page 17 of its brief) that there was no testimony that "United Fruit Company employees *ever* demounted the bin boards from their side slot positions", it would indeed be illogical to suggest that this, therefore, proves that employees of the stevedore company "demounted" the bin boards and then placed one of them in a precarious position in the rack.

Its further assertion that there is no testimony in the record that anyone other than longshoremen ever

handled bin boards while the vessel was in San Francisco can be of no particular aid or comfort to Appellant in light of its inability to prove that one of the stevedore workmen placed the precariously stored bin board in the access trunkway rack. The only direct evidence that anyone ever placed the small bin boards in this particular rack is in the deposition testimony of the vessel's Chief Mate, Andrew Nielsen, who testified it was his custom and practice between ports of call to pick up bin boards on the deck and place them in this rack in the access trunkway (R. 7, p. 136).

The trial court, therefore, had the testimony of the longshore personnel that they never placed small bin boards in the rack in the access trunkway; while on the other hand, Chief Mate Nielsen admitted that it was his practice to place these bin boards in this rack.

From all this, Appellant seeks to have this Court overturn the trial court's substantially supported finding that none of Appellee's employees were guilty of having placed the small bin board in a precarious position in the rack in the access trunkway.

A prime example of failure on the part of Appellant to fasten liability on the stevedore company is the testimony of David Harold Wild, terminal superintendent for the shipowner, and one of its chief witnesses. Mr. Wild testified that he was in close contact with the walking bosses employed by Marine Terminals in this entire operation to see that it was properly and efficiently performed. He observed no mishandling of the bin boards, neither did he have any knowledge as to whether some of the bin boards were in the rack

of the access trunkway (R. 5, pp. 54-55). The foregoing hardly supports Appellant's argument "that the bin board must have been placed in its precarious position by a longshoreman employed by Marine Terminals" (Appellant's Brief, p. 18).

Appellant has failed to overcome the provisions of Rule 52(a), the strict requirements of which are so aptly stated by Judge Sanborn in the case of *Cleo Syrup Corp. v. Coca-Cola Co.* (CCA 8th, 1943), 139 F.2d 416, 417-418, 150 ALR 1056, cert. den. (1944), 321 U.S. 781, 64 S.Ct. 638, 88 L. ed. 1047:

> "This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court (citing cases). The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly (citing cases). In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law (citing cases). . . . In determining whether there is a sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inferences deducible therefrom which is most favorable to the plaintiff."

CONCLUSION

For the reasons set forth herein, it is submitted that the lower court's judgment should be sustained.

Dated, San Francisco, California,
December 22, 1966.

Respectfully submitted,
EDWARD R. KAY,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD R. KAY,
Attorney for Appellee.